1990

Pioneer Credit Union formerly known as EIML Credit Union v. Whitfield Lee, L. Legrande Price, and Robert Schofield : Brief of Appellant

Utah Court of Appeals

James P. Cowley; David B. Watkiss; Debra J. Moore; Attorneys for Defendants/Respondents .
Bruce L. Richards; L. Tasman Biesinger; Richards, Biesinger; Wolfert & Neff; Attorneys for Plaintiff/Appellant.

IN THE UTAH STATE COURT OF APPEALS

STATE OF UTAH

PIONEER CREDIT UNION formerly known as EIML CREDIT UNION, Plaintiff/Appellant, -vs- WHITFIELD LEE, L. LEGRANDE PRICE, and ROBERT SCHOFIELD, Defendants/Respondents.	BRIEF OF APPELLANT PIONEER CREDIT UNION Case No. 900295 Priority Classification 14b.

APPEAL FROM THE THIRD JUDICIAL DISTRICT COURT
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

JUDGE UNO

JAMES P. COWLEY
DAVID B. WATKISS
DEBRA J. MOORE
Attorneys for Defendants/
Respondents Whitfield Lee,
L. LeGrande Price and
Robert Schofield
310 South Main Street, #1200
Salt Lake City, UT 84101

BRUCE L. RICHARDS
L. TASMAN BIESINGER
RICHARDS, BIESINGER, WOLFERT & NEFF
Attorneys for Plaintiff/Appellant
Pioneer Credit Union
1600 West 2200 South, #102
P.O. Box 26786
Salt Lake City, UT 84126-0786

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Salt Lake City, UT 84126-0786

LIST OF ALL PARTIES

1. Pioneer Credit Union, formerly known as EIML Credit Union, Plaintiff/Appellant.

2. Whitfield Lee, L. LeGrande Price, and Robert Schofield, Defendants/Respondents.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

I. STATEMENT OF JURISDICTION AND CASE HISTORY

The Utah State Court of Appeals has appellate jurisdiction over this matter pursuant to §78-2a3(2)(j), Utah Code Annotated, (1953 as amended). The nature of the proceedings below involve a damages suit against the defendants as a result of their issuing corporate checks as managing officers and directors of the corporation to the plaintiff that were subsequently dishonored upon presentment.

II. STATEMENT OF ISSUES PRESENTED ON APPEAL

1. Do partial payments of a debt obligation toll the statute of limitations to the date of the last partial payment pursuant to §76-12-44, Utah Code Annotated (1953 as amended)?

2. Does §78-12-40, Utah Code Annotated (1953 as amended) provide one year from the dismissal of the Complaint in the United States District Court for lack of federal jurisdiction?

3. Can the District Court determine basis for granting Summary Judgment in the nature of waiver and laches, when said basis were not raised in the Defendants' (moving party) Motion for Partial Summary Judgment?

4. Does actual "in person" notice satisfy the notice requirements of §7-15-1, et. seq., Utah Code Annotated, (1953 as amended)?

III. DETERMINITIVE STATUTES

Utah Code Annotated, §7-15-1, et. seq., as amended (See addendum).

Utah Code Annotated, §78-12-40, as amended:

> If any action is commenced within due time and a judgment thereon for the plaintiff is reversed, or if the plaintiff fails in such action or upon a cause of action otherwise that upon the merits, and the time limited either by law or contract for commencing the same shall have expired, the plaintiff, or if he dies and the cause of actions survives, his representatives, may commence a new action within one year after the reversal or failure.

Utah Code Annotated, §78-12-44, as amended:

> In any case founded on contract, when any part of the principal or interest shall have been paid, or an acknowledgement of an existing liability, debt or claim, or any promise to pay the same, shall have been made, an action may be brought within the period prescribed for the same after such payment, acknowledgement or promise; but such acknowledgement or promise must be in writing, signed by the party to be charged thereby. When a right of action is barred by the provisions of any statute, it shall be unavailable either as a cause of action or ground of defense.

IV. STATEMENT OF CASE

Plaintiff, Pioneer Credit Union, formerly known as EIML Credit Union, (Pioneer) appeal from a Summary Judgment in favor of the defendants entered by the Honorable Raymond S. Uno,

Third Judicial District Judge, on February 6, 1990. Plaintiff's Complaint asserts three causes of action. First, for payment of unpaid wages pursuant to §34-28-3, Utah Code Annotated; second, for fraud; and, third for damages caused by the issuance of the bad checks, incorporating Sections 7-15-1, et. seq., and 34-28-3, Utah Code Annotated (1953 as amended).

All three causes of action arise out of the defendants' acts as managing officers and agents of IML Freight, Inc., whereby the defendants issued corporate checks to the plaintiff pursuant to a well established payroll deduction plan for employees' wages. Pioneer relied upon the established procedure and credited the employees' accounts for the payroll deductions. When Pioneer presented the checks for payment, they were dishonored for insufficient funds. Subsequent payments were made by the defendants as managing officers and agents of the corporation to the plaintiff until the corporation filed a Chapter 11 Bankruptcy on or about July 15, 1983.

V. PROCEEDINGS AND DISPOSITION IN THE COURT BELOW

1. Plaintiff filed the complaint in the State Court on or about January 17, 1987. The defendants were served with Summons and Complaint on or about January 19, 1987. (Page 2).

1a. On or about July 1, 1986, plaintiff filed an action against the defendants in the United States District Court for the District of Utah, Central Division, including

three pendant state claims which are the three cause of action reasserted by the plaintiff in the state court action described in paragraph 1. On or about January 14, 1987, the United States District Court made and entered a Judgment and Order of Dismissal, dismissing the case upon the grounds and that the court had no jurisdiction to grant the federal relief sought and that since there was no federal claim over which the court had jurisdiction, the pendent state claims were also dismissed for lack of jurisdiction.

2. The defendants, on or about February 17, 1987, filed an Answer to the Complaint. (Page 12).

3. Plaintiff, on or about August 30, 1989, filed a Motion for Summary Judgment. (Page 82).

4. On or about October 3, 1989, the defendants filed a Motion for Partial Summary Judgment. (Page 161).

5. On or about November 20, 1989, a hearing was held before the Honorable Raymond S. Uno on the cross motions for Summary Judgment. Oral argument was given by counsel for the plaintiff, however because of insufficient time, oral argument for the defendants was continued to Wednesday, December 6, 1989. (Order, dated December 6, 1989, page 197).

6. Oral argument was given by defendants on or about December 6, 1989, on the cross motions for Summary Judgment. (Order dated December 6, 1989, page 197).

7. The Third Judicial District Court, on December 11, 1989 made and entered its Order denying plaintiff's Motion for Summary Judgment. (Page 197).

8. The defendants Motion for Partial Summary Judgment was taken under advisement and the parties were granted the opportunity to file further written memoranda with the court. (Order dated December 11, 1989, page 197).

9. Plaintiff filed its Response to Defendants' Oral Argument in Support of Defendants' Motion for Partial Summary Judgment on or about December 20, 1989. (Page 201).

10. Defendants filed their Memorandum in Response to Plaintiff's Memorandum dated December 20, 1989 and Final Memorandum in Support of Their Motion for Partial Summary Judgment. (Page 233).

11. The Third Judicial District Court, on or about January 9, 1990, entered a "Minute Entry" granting Defendants' Motion for Partial Summary Judgment and instructed Defendants to prepare the Order. (Page 258).

12. Plaintiff filed its Amended Objection to Defendants' Proposed Order on or about January 24, 1990. (Page 264).

13. Plaintiff acknowledged and stipulated that if the District Court entered the Summary Judgment as proposed by the Defendants, that the basis set forth therein for Summary

Judgment would also provide basis for the dismissal of Plaintiff's Second Cause of Action, for fraud, although not included in the original Motion for Partial Summary Judgment. (Page 265).

14. The Third Judicial District Court entered Summary Judgment in favor of defendants and against the plaintiff, "NO CAUSE OF ACTION", on February 6, 1990. (Page 271).

15. Plaintiff, Pioneer Credit Union, filed its Notice of Appeal on February 28, 1990. (Page 298).

VI. STATEMENT OF FACTS

1. The defendants were managing executive officers and agents of the corporation, IML Freight, Inc. (IML). Defendant Lee served as Chairman of the Board of Directors and as Chief Executive Officer, defendant Price served as Chief Financial Officer, and defendant Schofield served as Executive Vice-President and Chief Operating Officer. (Lee affidavit, para. 2, page 151; Price affidavit para. 2, page 145; Defendants' Memorandum in opposition to Plaintiff's Motion for Summary Judgment, para. 3, page 115; Summary Judgment, para. 2, page 273).

2. Plaintiff, Pioneer Credit Union, provided credit union services to the employees of the corporation including payroll deduction. (Summary Judgment, para. 3, page 274).

3. IML agreed to and did participate with the credit union and employees of IML in a voluntary payroll deduction plan, whereby the employees who so elected had a portion of their earnings deducted from their checks for deposit with Pioneer for credit to the accounts of the respective employees. (Rico affidavit, para. 4, page 94; Summary Judgment, para. 4, page 274).

4. The payroll deduction plan and procedure was well known by each of the defendants in their respective positions with the corporation. (Rico affidavit, para. 5, page 94).

5. These payroll procedures continued successfully and in full effect from approximately 1959 until 1983 when IML, through the defendants as managing officers and agents of the corporation, failed to pay the wages to Pioneer that are in dispute in this case. (Rico affidavit, para. 4, page 94; Plaintiff's Answer to Defendants' First Set of Interrogatories Answer 10, page 58).

6. For the payroll periods ending February 8, February 15 and February 22, 1983, under the direction of the defendants, IML sent a computer listing to Pioneer, whereby Pioneer credited the participating members/employees accounts. (Rico affidavit, para. 4, page 94; Plaintiff's Answer to Defendants' First Set of Interrogatories, Answer 10, page 58).

7. Under the direction of and by the defendants, IML, sent three (3) checks for the respective pay periods described in paragraph 6 that were signed by the defendants Lee and Price, totalling $245,163.00. (Summary Judgment, para. 5, page 274; Rico affidavit para. 7, page 94).

8. The checks were then dishonored upon presentment by Pioneer and returned for insufficient funds to Pioneer. (Summary Judgment, para. 6, page 274).

9. Subsequent to the payroll periods described in paragraph 6, in personal discussions with Mr. Fred Rico, President of Pioneer Credit Union, Pioneer informed defendants that the checks had been dishonored upon presentment. (Plaintiff's Answer to Defendants' First Set of Interrogatories, Answer 27, page 65).

10. Defendants indicated to Pioneer (Mr. Rico) that the deficient payroll amounts would be made up at some future time. (Plaintiff's Answer to Defendants' First Set of Interrogatories, Answer 27, page 65).

11. Pioneer was promised that the total amount due would be paid by the following Friday. When this did not happen, Pioneer was advised that payment would be paid by the next Tuesday, or approximately four days later. (Plaintiff's Answer to Defendants' First Set of Interrogatories, Answer 27, page 65).

12. At the subsequent Tuesday meeting, Pioneer was informed by the defendants that IML could not pay the amounts due to Pioneer at that time, but that Pioneer would be paid the amount that Pioneer had credited the employee/members' accounts at the rate of $10,000.00, or more, per week. (Plaintiff's Answer to Defendants' First Set of Interrogatories, Answer 27, page 65).

13. Subsequent payments totaling $58,682.00 were made to Pioneer and applied to the outstanding balance of $245,163.00 as follows:

Date	Payment of Wages
May 4, 1983	$10,000.00
May 6, 1983	10,000.00
June 15, 1983	10,000.00
June 17, 1983	10,000.00
June 24, 1983	8,682.00
July 6, 1983	10,000.00

14. The remaining outstanding balance as of July 6, 1983 is $186,481.00. (Summary Judgment, para. 8, page 275).

15. On July 15, 1983, IML filed a Chapter 11 proceeding in the United States Bankruptcy Court in the District of Utah, and converted to a Chapter 7 proceeding on November 9, 1984. (Summary Judgment, para. 9, page 275).

16. Fred S. Rico, President of Pioneer Credit Union, served as the Chairman of one of the creditors committees, in the Bankruptcy proceedings. Pioneer at first believed that IML could survive. (Plaintiff's Answer to Defendants' First Set of Interrogatories, Answer 21, page 63).

17. Pioneer defended an adversary proceeding brought by the Bankruptcy Trustee on behalf of IML, claiming the payroll deductions received at the outset of the Chapter 11 case were preferences. The Bankruptcy Court dismissed this action and held that the payments constituted wages due. (Plaintiff's Amended Answers to Defendants' First Set of Interrogatories, Answer 21).

18. Pioneer made an informal inquiry with the Industrial Commission. Pioneer was advised by the Industrial Commission that it would not handle the matter and deemed it to be a matter for a civil action. (Plaintiff's Amended Answers to Defendants' First Set of Interrogatories, Answer 22).

19. Pioneer filed its original Complaint in the United States District Court, District of Utah, on or about July 1, 1986, after it became apparent that recovery from IML was unlikely. (Summary Judgment, para. 14, page 277).

20. The United States District Court on or about January 9, 1987, dismissed the federal causes of action for lack of jurisdiction, resulting in the dismissal of the pendant state claims also being dismissed for lack of jurisdiction. (Summary Judgment, para. 14, page 277).

21. As a result of the defendants' issuing the dishonored checks and Pioneer's reliance upon the defendants' representations and partial payments, Pioneer has been damaged

in the amount of $186,481.00, plus interest at the highest legal rate.

VII. SUMMARY OF ARGUMENTS

POINT I: The partial payments made by the defendants on the obligation resulted in tolling all applicable statutes of limitations to the date of the last payment (July 6, 1983), pursuant to §78-12-44, Utah Code Annotated (1953 as amended). Pioneer's filing of its Complaint in the United States District Court on or about July 1, 1986, was accomplished within three years from the date of the last payment, and therefore, was filed timely.

POINT II: Section 78-12-40 Utah Code Annotated (1953 as amended) provides Pioneer one year from the date the United States District Court dismissed Pioneer's Complaint for lack of federal jurisdiction, (other than upon the merits), to refile its Complaint in the State Court. Pioneer refiled its Complaint in the State Court within one week of the United States District Court's dismissal and therefore, filed timely.

POINT III: The inclusion of waiver and laches as a basis for summary judgment denied Pioneer its constitutional right of due process. The defendants did not raise waiver and laches as a basis for their Motion for Partial Summary Judgment. Neither party submitted any affidavits, depositions, admissions or filed any memoranda addressing waiver and laches as a basis

for summary judgment. As a result, Pioneer has been denied its opportunity to present pertinent materials in opposition to said basis for summary judgment.

POINT IV: Actual "in person" notice of dishonored checks satisfies the notice requirements of §7-15-1 et seq., prior to filing legal action. Section 7-15-2(1) presumes notice to be given when written notice is deposited in the United States mails. Pioneer instead provided actual "in person" verbal notice to the defendants, providing them an opportunity to correct the problem.

In the alternative, if actual verbal notice is not sufficient, failure to provide written notice is merely a procedural requirement and Pioneer should have one year from the date of this Court's decision to provide written notice and to refile its action.

VIII. ARGUMENT

POINT I

ALL APPLICABLE STATUTES OF LIMITATIONS WERE TOLLED BY §78-12-44, UTAH CODE ANNOTATED.

It is the general rule in the State of Utah that "a cause of action for a debt begins to run when the debt is due and payable because at that time an action can be maintained to enforce it." O'Hair v. Kounalis, 463 P.2d 799, 800 (Utah 1970); Butcher v. Gilroy, 744 P.2d 311, 313 (Utah App. 1987). In the

present case, it is undisputed that the cause of actions arose when payment was denied for each of the three checks for the respective payroll periods in February, 1983. It is further undisputed that payments on the debt totaling $58,682.00 were made by the defendants as managing officers and agents of IML, through and including July 6, 1983.

The statute of limitations pursuant to §78-12-26 or 78-12-27, Utah Code Annotated (1953 as amended) each establish a three year period to file an action. These and all other possible statutes of limitations were tolled to the date of the last partial payment and acknowledgement of the existing debt pursuant to §78-12-44, Utah Code Annotated (1953 as amended). Section 78-12-44 provides:

> In any case founded on contract, when any part of the principal or interest shall have been paid, or an acknowledgement of an existing liability, debt or claim, or any promise to pay the same, shall have been made, an action may be brought within the period prescribed for the same after such payment, acknowledgement or promise; but such acknowledgement or promise must be in writing, signed by the party to be charged thereby. When a right of action is barred by the provisions of any statute, it shall be unavailable either as a cause of action or ground of defense. (emphasis added).

Interpreting the predecessor to §78-12-44, the Utah State Supreme Court, in Holloway v. Wetzel, 45 P.2d 565 (Utah 1935), held that the partial payment is a reaffirmation on the debt due. The Court stated:

> In the contemplation of a statute, the part payment of the debt is regarded as evidence of a willingness and obligation to pay the residue, as conclusive as would be a personal written promise to that effect. It could not, then, have been intended to give this effect to payments other than those made by the party himself, or under his immediate direction. (emphasis added).

Holloway v. Wetzel, supra, at page 568.

This Court, in Butcher v. Gilroy, 744 P.2d 311, 314 (Utah App. 1987), held that under Holloway, supra, §78-12-44 extends a statute of limitations, "only if: (1) partial payment of either principal or interest due under the settlement agreement was made, (2) by the debtor/obligor of the settlement agreement (or by a third party at Gilroy's direction), and, (3) the payment was made to the creditor under the settlement agreement." (emphasis added).

The Utah State Supreme Court's decision in Holloway, supra, and this Court's decision in Butler, supra, establish that the partial payments made by the defendants through and including July 6, 1983, had the effect of tolling the applicable statute of limitations allowing an action to be brought within three years same after the final partial payment pursuant to §78-12-44 U.C.A. (1953 as amended). The filing of the Plaintiff's original Complaint in the United States District Court on or about July 1, 1986, was filed within three years from the date of the last payment, and therefore filed timely.

POINT II

SECTION 78-12-40, UTAH CODE ANNOTATED (1953 AS AMENDED) PROVIDES PLAINTIFF ONE YEAR TO COMMENCE A NEW ACTION AFTER THE DISMISSAL OF THE COMPLAINT FILED IN THE FEDERAL DISTRICT COURT OTHER THAN UPON THEIR MERITS.

Subsequent to the Bankruptcy Court's determination that the partial payments paid by IML to Pioneer were wage payments and therefore not part of the bankruptcy estate, (an action brought by the IML Freight, Inc., Bankruptcy Trustee asserting that the amounts paid to the credit union were not wages, on behalf of IML, Pioneer determined that recovery from the bankruptcy was unlikely, and therefore filed its original Complaint in the Federal District Court of Utah, Central Division, on or about July 1, 1986. Said Complaint alleged five causes of action including two causes of action under the Fair Labor Standards Act (29 U.S.C. §201 et. seq.), and three pendent state causes of action. The Honorable Judge Jay Thomas Green, held that the United States District Court lacked jurisdiction on the two federal causes of action, therefore the pendent state causes of action also failed for lack of jurisdiction. The Order of Dismissal was entered by Judge Green on January 9, 1987. Pioneer then filed the current complaint in the Third Judicial District Court in and for Salt Lake County, State of Utah, on or about January 12, 1987. The filing of the current

complaint in the Third District Court, was filed within less than one week of the dismissal by the Federal Court. Section 78-12-40, Utah Code Annotated, (1953 as amended) provided Pioneer one year after the dismissal to commence a new action. Section 78-12-40, Utah Code Annotated (1953 as amended), states:

> If any action is commenced within due time and a judgment thereon for the plaintiff is reversed, or if the plaintiff fails in such action or upon a cause of action otherwise than upon the merits, and the time limited either by law or contract for commencing the same shall have expired, the plaintiff, or if he dies and the cause of action survives, his representatives, may commence a new action within one year after the reversal or failure. (Emphasis added)

Discussing the legislative intent behind §78-12-40, U.C.A., the Utah State Supreme Court has stated:

> We think, however, that the purpose behind the statute is plain and that the legislature intended that anyone who had a cause in litigation which was dismissed for some reason "otherwise than upon the merits" should have a reasonable time, which is set as one year, to reassert an attempt to establish his rights in court.

Thomas v. Braffet's Heirs, 305 P.2d 507, 510 (Utah 1956).

In a fact situation very similar to the present case, the Utah State Supreme Court, in Rhoades v. Wright, 622 P.2d 343 (Utah 1988), held that §78-12-40 extended the time to bring a suit to one year after the dismissal of a federal

action dismissed for lack of federal jurisdiction. Rhoades, supra, was a wrongful death action originally filed in the United States District Court for Utah, alleging diversity jurisdiction and personal jurisdiction over the defendants under the Utah long arm statute. The Federal Court dismissed the action for lack of diversity jurisdiction and subsequently dismissed the pendant state claims for lack of federal jurisdiction. The plaintiffs then filed an action in Colorado which was time-barred under the applicable Colorado statutes. The plaintiffs then filed an action in the Utah State District Court for San Juan County. The court found that the Federal District Court action was dismissed without prejudice for lack of jurisdiction and "hence other than on the merits" and that the subsequent filing in the Utah District Court was filed within one year of that dismissal. The Court held:

> In applying the Utah limitation provision for wrongful death actions, a matter previously determined by this Court to effect the remedy and not the cause of action itself, we hold that the Utah tolling statute applies and extends the time to bring suit to one year after the dismissal of the federal action, a limitation complied with in this action. (emphasis added)

Rhoades, supra, at page 350.

The Utah State Supreme Court has had additional occasions to discuss §78-12-40, U.C.A., and on each occasion has

held that the plaintiff had one year from the dismissal of the original complaint, when dismissed "other than upon the merits" as was Pioneer's original filing in the United States District Court. See: Yates v. Vernal Family Health Center, 617 P.2d 352, 354, (Utah 1980); McGuire v. University of Utah Medical Center, 603 P.2d 786, 788 (Utah 1979); Foil v. Ballinger, 601 P.2d 144 149 (Utah 1979); Madsen v. Borthick, 769 P.2d 245, 254 (Utah 1988); and, Dunn v. Kelly, 675 P.2d 571, 572 (Utah 1983).

As the Utah Supreme Court held in Rhoades v. Wright, supra, the United States District Court's dismissal of Pioneer's Complaint based upon lack of federal jurisdiction, was "other than on the merits" invoking the Utah tolling statute, §78-12-40 U.C.A., providing Pioneer one year after the dismissal of the federal action to bring suit in the state court, a limitation complied with in this case. Therefore, Pioneer's cause of action is not barred by the three year statute of limitations.

POINT III

WAIVER AND LACHES WERE NOT BRIEFED OR ARGUED BY THE PARTIES AND THEREFORE SHOULD NOT BE A BASIS FOR SUMMARY JUDGMENT.

Defendants' Motion for Partial Summary Judgment, upon which the Third Judicial District Court entered it's Judgment, moved for Summary Judgment against the first and third causes of action set forth in Pioneer's Complaint on the basis that Pioneer's claims were barred by applicable statutes

of limitations. Neither the defendants or the plaintiff raised or addressed any issues concerning whether the plaintiff's causes of action were barred by waiver and laches.

Judge Uno's Minute Entry granting judgment for the defendants on their Motion for Summary Judgment states only "Based on Pleadings and Memoranda filed, the Court grants defendants' Motion for Partial Summary Judgment. Motion for oral argument is denied. Defendant to prepare the Order". Judge Uno made no specific findings or drafted any memorandum decision. Pursuant to the Court's Minute Entry, counsel for the defendant prepared the Order that was entered, which includes a basis for Summary Judgment of waiver and laches. Plaintiff specifically objected to the inclusion of waiver and laches as a basis for Summary Judgment on the Motion for Partial Summary Judgment. Not withstanding, the Court entered the judgment.

It is well established law in this state that Summary Judgment "should not been done on conjecture, but only when the matter is clear, and in case of doubt, the doubt should be resolved in allowing the challenged party the opportunity of at least attempting to prove his right to recover." Duham v. Margetts, 571 P.2d 1332, 1334 (Utah 1977). "Summary Judgment is proper only if the pleadings, depositions, affidavits and admissions show that there is no genuine issue of material fact

and that the moving party is entitled to judgment as a matter of law. If there is any doubt or uncertainty concerning questions of fact, the doubt should be resolved in favor of the opposing party." Utah State University v. Sutro and Company, 646 P.2d 715 (Utah 1982).

Although the defendants raised waiver and laches as a defense in their Answer, there were no affidavits, depositions, admissions, or any other pleading or memoranda filed addressing said defense as a basis for the defendants' Motion for Partial Summary Judgment. The inclusion of waiver and laches as a basis for Summary Judgment has resulted in the denial of Pioneer's constitutional right of due process.

The Utah State Supreme Court has on at least two occasions had an opportunity to address similar issues involving Rule 12(b)(6) Motions. Both cases involved Rule 12(b)(6) Motions that also consider matters outside of pleadings and thus treated by the District Court as a Motion for Summary Judgment and disposed of said Motions as provided in Rule 56. In both instances the District Court did not provide reasonable opportunity to the plaintiff to present all material made pertinent in entering a Summary Judgment in favor of the defendants and moving parties. In Stran v. Associated Students of University of Utah, 561 P.2d 191, 193 (Utah 1977), the Court held:

> Once the determination is made to consider the materials, the mandatory provision of

> Rule 12(b) controls, vis., all parties must be given adequate notice and opportunity to submit supporting materials, particularly the party against whom summary judgment is entered. It is error to consider a motion to dismiss as a motion for summary judgment, without giving the adverse party an opportunity to present pertinent material. The action of the trial court in denying the plaintiff the reasonable opportunity to present controverting material violated the mandate of the Rule.

Similarly the Utah Supreme Court held in Bekins Bar V Ranch v. Utah Farm Production, 587 P.2d 151, 152 (Utah 1978):

> This record does not clearly show that plaintiff was given". . . reasonable opportunity to present all material made pertinent. . ." by a Rule 56 motion for summary judgment.
>
> We hold that it is necessary that the record clearly and affirmatively demonstrate that when a motion to dismiss is made and". . . matters outside the pleading are presented to and not excluded by the court. . ." that all parties (including, of course, the non-movant which was the plaintiff in this case) are given responsible opportunity to present additional pertinent material if they wish.
>
> (Cites omitted).

In the present case, waiver and laches were never plead by the defendants as a basis for their Motion for Partial Summary Judgment. The defendants Memorandum in support of its Motion for Partial Summary Judgment gave no notice nor addressed said issue; no affidavits or memoranda were submitted.

Therefore, Pioneer never addressed any claim of waiver and laches. To enter a judgment on the basis of waiver and laches without providing Pioneer, the responding party, the opportunity to present additional pertinent material if they so wished violates Pioneer's constitutional right to due process of law.

POINT IV

DOES ACTUAL NOTICE SATISFY THE NOTICE REQUIREMENTS OF §7-15-1 ET SEQ., UTAH CODE ANNOTATED (1953 AS AMENDED)?

Pioneer's Third Cause of Action is based on the defendants issuing and delivering checks to Pioneer pursuant to the payroll deduction program, that were dishonored upon presentment for insufficient funds. The Cause of Action incorporated liability under §7-15-1, Utah Code Annotated (1953 as amended). Section 7-15-1(1) provides:

> Any person who makes, draws, signs, or issues any check, draft, order, or other instrument upon any depository institution, whether as corporate agent or otherwise, for the purpose of obtaining from any person, firm, partnership, or corporation any money, merchandise, property, or other thing of value or paying for any service, wages, salary, or rent is liable to the holder of the check, draft, order, or other instrument if the check, draft, order, or other instrument is not honored upon presentment and is marked "refer to maker" or the account upon which the check, draft, order, or other instrument has been made or drawn does not exist, has been closed, or does not have sufficient funds or sufficient credit for payment in full of the check, draft, or other instrument. (emphasis added).

Section 7-15-1(2) Utah Code Annotated establishes that "written notice of intent to file civil action" be sent to the maker of the dishonored check to "allow the person seven days from the date on which the notice is mailed to tender payment in full, plus the service charge imposed for the dishonored check." The legislature then, in Section 7-15-2(2) U.C.A., set forth the basic form that said notice should take under §7-15-1(2). The apparent intent of the legislature in requiring the prelitigation notice, as acknowledged by the defendants in their Memorandum in Opposition to Plaintiff's Motion for Summary Judgment, page 125, "is to provide the makers of dishonored checks an opportunity to correct the problem before expensive litigation is commenced."

In the present case, although Pioneer did not draft written notice as set out in §§7-15-1(2) and 7-15-2(2), and deposit it in the United States Mails, wherein notice is "conclusively presumed to have been given," §7-15-2(1), Pioneer provided actual notice "in person" to the defendants, as provided for in §7-15-2(1).

By way of personal meetings with Mr. Fred S. Rico, President of Pioneer Credit Union, the defendants were informed that the checks had been dishonored and given the opportunity to correct the problem. In response to said actual notice, the defendants assured Mr. Rico that the credit union would be paid for the dishonored checks, and entered into the payment plan resulting in the partial payments received through July 6, 1983.

Pioneer believes that it has gone one step beyond the requirement set forth in §7-15-1(2) and §7-15-2(2), by providing the defendants with actual notice "in person" rather than merely depositing written notice in the United States mail, and having notice "conclusively presumed to have been given." Therefore, plaintiff's claims against the defendants for the issuance of the dishonored checks should not be barred by the notice requirements set forth in §7-15-1 and §7-15-2.

Assuming arguendo, that this Court requires that specific compliance with the written notice requirements set forth in Sections 7-15-1(2) and 7-15-2(2) be made, said requirement is merely procedural and should not result in a dismissal of Pioneer's claims upon the merits. The Utah State Supreme Court on at least two occasions when the plaintiffs have failed to provide written notice as required under the Utah Health Care Malpractice Act, §78-14-8, Utah Code Annotated (1953 as amended), has held that such failure was merely a procedural defect allowing the plaintiff one year from the date of dismissal to provide notice and refile the action. In Foil v. Ballinger, 601 P.2d 144, 150 (Utah 1979), held:

> Section 78-14-8 merely prescribes a condition precedent to the filing of a summons or a complaint. A failure to comply with such conditions does not constitute an ajudication on the merits, but is merely a procedural defect that does not relate to the merits of the basic action in any way.

The Court again in, Yates v. Vernal Family Health Center, 617 P.2d 352, 354 (Utah 1980), further stated "Therefore, pursuant to §78-12-40, appellant has one year from the dismissal of that action-or, in this situation, one year from the filing of this opinion-in which to bring that action." Consistent with the Supreme Court's ruling in both Foil v. Ballinger, supra, and Yates v. Vernal Family Health Center, supra, should this Court determine that Pioneer in fact failed to provide the required notice pursuant to §7-15-1, et. seq., said failure to comply is merely a procedural defect and Pioneer has one year from the filing of this Court's opinion in which to provide notice and refile its action.

CONCLUSION AND RELIEF SOUGHT

The trial court errored in granting the defendants Motion for Partial Summary Judgment resulting in dismissing all of Plaintiff's causes of action. Plaintiff's causes of action are not barred by any three year statute of limitation. All applicable statutes of limitations were tolled by the partial payments made through July 6, 1983.

Pioneer's filing of it's Complaint in the United States District Court on or about July 1, 1986, constituted a timely filing. The subsequent dismissal by the Federal District Court

for lack of federal jurisdiction on the federal and pendant state claims is other than upon the merits, and pursuant to §78-12-40, Utah Code Annotated (1953 as amended) Pioneer had one year from the date of the dismissal to commence a new action.

The trial court's inclusion of of waiver and laches is not supported by any pleadings, memoranda or affidavit thereby denying Pioneer its constitutional right to due process when included in the Summary Judgment.

The notice requirements under §7-15-1, et. seq., were satisfied by the actual notice given to defendants by Pioneer during conversations with Pioneer's President, Fred S. Rico. In the alternative, failure to strictly comply with the conditions set forth in §7-15-1, et. seq., is merely a procedural defect whereby, pursuant to §78-12-40, Pioneer will have one year from the date of this Court's filing of its opinion, to provide written notice and refile its complaint.

Therefore, the precise relief sought by plaintiff, Pioneer Credit Union, is that the Summary Judgment in favor of the defendants, be reversed and the case be remanded to the District Court.

DATED this 18th day of June, 1990.

RICHARDS, BIESINGER, WOLFERT & NEFF

BRUCE L. RICHARDS
L. TASMAN BIESINGER
Attorneys for Appellant
Pioneer Credit Union

A D D E N D U M

CHAPTER 13

SAVINGS AND LOAN ACT

(Repealed by Laws 1975, ch. 150, § 1; 1977, ch. 19, § 8; 1981, ch. 16, § 1.)

7-13-1 to 7-13-74. Repealed.

CHAPTER 14

CREDIT INFORMATION EXCHANGE

Section
7-14-1. Definitions.
7-14-2. Legislative findings.
7-14-3. Information an institution may furnish.
7-14-4. Immunity from liability.
7-14-5. Reciprocal exchange of information authorized.

7-14-1. Definitions.

As used in this chapter:

(1) "Depository institution" means any institution authorized by state or federal law to accept and hold demand deposits or other accounts which may be used to effect third party payment transactions. The definition of "depository institution" in Chapter 1 does not apply to Chapter 4 [14].

(2) "Credit reporting agency" includes any cooperative credit reporting agency maintained by an association of financial institutions or one or more associations of merchants. 1981

7-14-2. Legislative findings.

The substantial financial loss to the state and to trade and commerce within this state resulting from the dishonor or other return of checks, drafts, or other orders for the payment of money, including transactions to be consummated by electronic means, requires concerted effort by financial institutions to attempt to minimize the number of such occurrences. The Legislature finds that to facilitate such concerted effort adequate protection against liability of the participating financial institutions is necessary. 1981

7-14-3. Information an institution may furnish.

Any institution doing business in the state may report to any other financial institution, or credit reporting agency the following: (1) that an account maintained to effect third party payment transactions has been closed out by the institution, the reasons therefor, and the identity of the depositor or account holder; (2) upon the request of another financial institution any other information in the files of the institution relating to the credit experience of the reporting institution with respect to a particular person as to whom inquiry is made; and (3) any information concerning attempted or potential activity to defraud a financial institution or to obtain funds from a financial institution by fraudulent or other unlawful means or other information relating to individuals sought by law enforcement authorities for alleged violations of criminal laws. 1981

7-14-4. Immunity from liability.

No depository institution making any report or communication of information authorized by this chapter shall be liable to any person for disclosing such information to any recipient authorized to receive this information under this chapter, or for any error or omission in such report or communication. 1981

7-14-5. Reciprocal exchange of information authorized.

One or more financial institutions may jointly agree with one or more other financial institutions for the reciprocal exchange of any information authorized to be reported by the provisions of this chapter. Such reciprocal exchange of information or the acts or refusals to act of one or more recipients because of such information shall not constitute a boycott or blacklist, or otherwise be a basis for liability to any person on the part of any participant in the reciprocal exchange of information authorized by this chapter. 1981

CHAPTER 15

DISHONORED INSTRUMENTS

Section
7-15-1. Civil liability of issuer — Notice of action — Collection costs.
7-15-2. Notice — Form.
7-15-3. Liability of financial institution upon wrongful dishonor.

7-15-1. Civil liability of issuer — Notice of action — Collection costs.

(1) Any person who makes, draws, signs, or issues any check, draft, order, or other instrument upon any depository institution, whether as corporate agent or otherwise, for the purpose of obtaining from any person, firm, partnership, or corporation any money, merchandise, property, or other thing of value or paying for any service, wages, salary, or rent is liable to the holder of the check, draft, order, or other instrument if the check, draft, order, or other instrument is not honored upon presentment and is marked "refer to maker" or the account upon which the check, draft, order, or other instrument has been made or drawn does not exist, has been closed, or does not have sufficient funds or sufficient credit for payment in full of the check, draft, or other instrument.

(2) The holder of the check, draft, order, or other instrument which has been dishonored may give written or verbal notice of dishonor to the person making, drawing, signing, or issuing the check, draft, order, or other instrument and may impose a service charge that may not exceed $15. Prior to filing an action based upon this section, the holder of a dishonored check, draft, order, or other instrument shall give the person making, drawing, signing, or issuing the dishonored check, draft, order, or other instrument written notice of intent to file civil action, allowing the person seven days from the date on which the notice was mailed to tender payment in full, plus the service charge imposed for the dishonored check, draft, order, or other instrument.

(3) In a civil action, the person making, drawing, signing, or issuing the check, draft, order, or other instrument is liable to the holder for:

(a) the amount of the check, draft, order, or other instrument;

(b) interest; and

(c) all costs of collection, including all court costs and reasonable attorneys' fees.

(4) As used in this section, "costs of collection" includes reasonable compensation, as approved by the court, for time expended if the collection is pursued personally by the holder and not through an agent. 1988

7-15-2. Notice — Form.

(1) "Notice" means notice given to the person making, drawing, or issuing the check, draft, order, or other instrument either in person or in writing. A written notice is conclusively presumed to have been given when properly deposited in the United States mails, postage prepaid, by certified or registered mail, return receipt requested, and addressed to the signer at his address as it appears on the check, draft, order, or other instrument or at his last-known address.

(2) Written notice as applied in Subsection 7-15-1(2) shall take substantially the following form:

Date: _____

To: _____

You are hereby notified that the check(s) described below issued by you has been returned to us unpaid:

Instrument date: _____

Instrument number: _____

Originating institution: _____

Amount: _____

Reason for dishonor (marked on instrument):

_____

This instrument, together with a service charge of $15 must be paid to the undersigned within seven days from the date of this notice in accordance with Section 7-15-1, Utah Code Annotated 1953, or appropriate civil legal action may be filed against you for the amount due and owing together with service charges, interest, court costs, attorneys' fees, and actual costs of collection as provided by law.

In addition, the criminal code provides in Section 76-6-505, Utah Code Annotated 1953 that any person who issues or passes a check for the payment of money, for the purpose of obtaining from any person, firm, partnership, or corporation, any money, property, or other thing of value or paying for any services, wages, salary, labor, or rent, knowing it will not be paid by the drawee and payment is refused by the drawee, is guilty of issuing a bad check.

The civil action referred to in this notice does not preclude the right to prosecute under the criminal code of the state of Utah.

(Signed) _____

Name of Holder: _____

Address of Holder: _____

Telephone Number: _____

1988

7-15-3. Liability of financial institution upon wrongful dishonor.

If a person is liable to a holder under Section 7-15-1, and the liability is proximately caused by a financial institution's wrongful dishonor under Section 70A-4-402, any award against the financial institution under Section 70A-4-402 shall include, but not be limited to, all amounts awarded against the person to the holder under Section 7-15-1. 1988

CHAPTER 16

CONSUMER FUNDS TRANSFER FACILITIES ACT

Section

7-16-1. Repealed.

7-16-2. Definitions.

7-16-3. Application of act — Restrictions on use of facilities.

7-16-4 to 7-16-8. Repealed.

7-16-9. Authority to make facilities available to institutions in contiguous states and to connect with regional or national systems.

7-16-10. Contractual waiver of Uniform Commercial Code provisions.

7-16-11 to 7-16-18. Repealed.

7-16-19. Installation and operation of automatic teller machine — Notice — Approval or disapproval by commissioner — Restrictions.

7-16-1. Repealed. 1985

7-16-2. Definitions.

As used in this chapter:

(1) "Automated teller machine" means an unmanned, free-standing electronic information processing device, located separate and apart from a financial institution's principal office, branch, or detached facility, which uses either the direct transmission of electronic impulses to a financial institution or the recording of electronic impulses or other indicia of a transaction for delayed transmission to a financial institution in order to perform financial transactions.

(2) "Point-of-sale terminal" means a manned electronic information processing device, other than a telephone, located at the point of sale and separate and apart from a financial institution's principal office, branch, or detached facility, which uses either the direct transmission of electronic impulses to a financial institution or the recording of electronic impulses or other indicia of a transaction for delayed transmission to a financial institution in order to perform financial transactions. However, point-of-sale terminals includes electronic information processing devices which interface with the telephone transmission system and which, either through the direct transmission of electronic impulses or the recording and delayed transmission of electronic impulses to a financial institution, perform financial transactions. Nothing in this definition prevents a device which constitutes a point-of-sale terminal from being used to perform, for its operator, any internal business functions that are not financial transactions.

(3) "Financial transaction" means cash withdrawals, deposits, account transfers, payments from deposit, loan or thrift accounts, disbursements under a preauthorized credit agreement, or loan payments and other similar transactions initiated by an account holder.

(4) "Consumer funds transfer facility" means either an automated teller machine, or a point-of-sale terminal, including any supporting equipment, structures, or systems. A point-of-sale terminal owned or operated by and on the premises of a person primarily engaged in the business of selling or leasing goods or non-financial services and capable of performing the functions of a consumer funds transfer facility, is not considered to be a consumer funds transfer facility unless connected on-line or off-line to a financial institution for the purpose of performing financial transactions.

(5) "Merchant" means a person primarily engaged in the retail sale or lease of goods or non-financial services.

(6) "Control" means ownership, directly or indirectly, of a majority of the outstanding shares

MAILED POSTPAID this 18th day of June, 1990, four (4) copies of the Brief of Appellant Pioneer Credit Union to:

Mr. James P. Cowley
Mr. David B. Watkiss
Ms. Debra J. Moore
Attorneys for Defendant/Respondents Whitfield Lee, L. LeGrande Price and Robert Schofield
310 South Main Street, No. 1200
Salt Lake City, UT 84101

L. Jasman Bressing